

**Senate Bill No. 372**

(By Senator Carmichael)

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[Introduced January 30, 2015; referred to the Committee on the Judiciary.]  
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A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article, designated §55-10A-1, §55-10A-2, §55-10A-3, §55-10A-4, §55-10A-5, §55-10A-6 and §55-10A-7, all relating to mediation of civil actions pending in the circuit courts of this state.

*Be it enacted by the Legislature of West Virginia:*

That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new article, designated §55-10A-1, §55-10A-2, §55-10A-3, §55-10A-4, §55-10A-5, §55-10A-6 and §55-10A-7, all to read as follows:

**ARTICLE 10A. MEDIATION.**

**§55-10A-1. The importance of mediating disputes.**

(a) The extent to which not only those who find themselves involved in civil litigation before the courts of this state but also the public in general perceive that the resolution of such litigation is achieved in a fair, efficient and impartial manner, without regard to the citizenship of the litigants or whether the litigants are individuals, partnerships, joint ventures or corporations impacts the economy of the State of West Virginia and the welfare of its citizens. Where the perception is that

1 such litigation involves undue costs or delay, the growth of the state's economy and the economic  
2 security of its citizens are adversely impacted. Accordingly, it is appropriate that mechanisms be  
3 adopted by the Legislature that encourage the negotiated resolution of civil litigation in a manner  
4 considered fair and equitable to all parties. One proven mechanism for achieving this goal is  
5 mediation. Mediation serves to expedite the resolution of civil litigation, thereby reducing the costs  
6 to not only the litigants but also to the state. It also serves to foster resolution of civil litigation on  
7 terms satisfactory to the litigants rather than imposing a resolution that may prove unacceptable to  
8 them.

9 (b) Because mediation historically has been conducted on an *ad hoc* basis in civil litigation  
10 and, as a consequence, the nature, quality and results of such mediation have been inconsistent, the  
11 Legislature believes that a uniform system for mediation should be adopted for application  
12 throughout the state.

13 **§55-10A-2. Definitions.**

14 As used in this section:

15 (1) "Court" refers to the court in which the civil action at issue is pending;

16 (2) "Civil action" means any action pending before the circuit court of the state, exclusive  
17 of all criminal actions arising under the provisions of the state penal code;

18 (3) "Mediation" means the process of attempting to bring about a settlement of a dispute  
19 between parties to civil actions utilizing the services of a neutral, third party acting as an  
20 intermediary agent between the parties;

21 (4) "Party" or "Parties" means the litigants involved in civil litigation or their representatives;

22 (5) "Mediator" means any member in good standing of the West Virginia State Bar, including

1 active or retired circuit court judges and retired Supreme Court justices who have completed  
2 mediation training offered by the West Virginia State Bar; and

3 (6) “Promptly” means not more than ten business days unless otherwise directed by the  
4 circuit court before which a civil action is pending.

5 **§55-10A-3. The mediation process.**

6 All mediations involving a civil action shall be conducted in the following manner:

7 (1) Upon motion of any party to civil action or upon the circuit court’s own motion, an order  
8 shall promptly be entered directing the parties to engage in mediation.

9 (2) Upon entry of an order directing the parties to engage in mediation, the parties or their  
10 representatives shall promptly meet to select a mediator from a list of candidates that have  
11 successfully completed mediation training offered by the West Virginia State Bar. During the  
12 selection process, the parties shall have no *ex parte* communications with any proposed mediator but  
13 shall, instead, jointly communicate with him or her about their ability to serve as their mediator.

14 (3) If the parties cannot reach an agreement as to a mediator, they shall jointly inform the  
15 court that they have reached an impasse and request that the court select a mediator from a list of  
16 qualified individuals submitted by the parties who have indicated their willingness to serve in that  
17 capacity. That list shall be comprised of the names of three potential mediators offered by each  
18 party, those names being listed in alphabetical order. The name of the judge presiding over the civil  
19 action may not be included on that list and he or she may not serve as a mediator in the case.

20 (4) Once the mediator is selected, the parties shall submit such documents and written  
21 submissions as the mediator deems necessary to become informed of the nature of the dispute and  
22 the positions of the parties. All such submissions shall be treated as confidential by the mediator and

1 may not be disclosed to any other party to the mediation without the express permission of the  
2 submitting party. In no event may the parties' submissions be disclosed to any third-party, including,  
3 but not limited to, the court.

4 (5) Following submission of any documents requested by the mediator, the parties and their  
5 counsel shall meet and enter into negotiations aimed at reaching a resolution of the dispute, utilizing  
6 the services of the mediator. Persons with actual authority to agree to a negotiated resolution of the  
7 dispute shall attend all mediation sessions unless expressly excused from doing so by the mediator.  
8 Attendance may be in person or by phone. All information communicated to the mediator by a party  
9 shall remain confidential and not be disclosed to any other party unless that confidentiality is  
10 expressly waived. No information disclosed to the mediator or another party during mediation may  
11 be disclosed to any third-party, including, but not limited to, the court, and, unless otherwise  
12 discoverable, may not be used as evidence at trial of the civil action.

13 (6) Where the mediator believes that the mediation process should be suspended or adjourned  
14 in order to allow the parties to further assess their position with regard to settlement, he or she may  
15 so direct. The mediation process shall continue, however, until such time as a settlement of the  
16 dispute is reached or one of the parties or the mediator declares that an impasse has been reached.

17 (7) Where mediation results in a settlement of the dispute, the terms of that settlement shall  
18 be committed to writing by the mediator and signed by the parties to the settlement. Thereafter, the  
19 court shall be advised by the mediator that a settlement has been reached and an order dismissing  
20 the civil action shall promptly be entered.

21 (8) Where the mediation process results in an impasse, the mediator shall advise the court  
22 as follows: "The parties to civil action no. \_\_\_\_ - \_\_\_\_\_ and styled \_\_\_\_\_ v.

1 \_\_\_\_\_ have attempted to mediate their dispute. Those efforts have reached a final impasse.”  
2 The mediator may not, as part of any such communication, inform the court of, and the circuit court  
3 may not inquire as to, the reason for the impasse or the last settlement offers of the parties prior to  
4 impasse.

5 **§55-10A-4. Confidentiality.**

6 (a) The parties and the mediator may not disclose to any third-party, including, but not  
7 limited to, the court, any documents disclosed or information communicated during mediation, or  
8 the settlement positions of any party, including, but not limited to, offers and demands. Should  
9 counsel for any party or the mediator do so, that disclosure shall be immediately reported to the  
10 Lawyer Disciplinary Board of the West Virginia State Bar Association for evaluation and  
11 investigation pursuant to Rule 2.4 of the Rules of Lawyer Disciplinary Procedure.

12 (b) In order to maintain the independence and integrity of the mediation process, the circuit  
13 court judge may not become involved in any way in the mediation of a civil action pending before  
14 it other than as set forth above. It may not inquire as to the position of the parties regarding  
15 settlement either on or off the record and may not inquire of the mediator or any party to the  
16 mediation process regarding any other aspect of the mediation should the mediator advise it that the  
17 parties' efforts at mediation reach an impasse: *Provided*, That the court may inquire of the parties  
18 whether, notwithstanding the report of the mediator, one or both of the parties believes further  
19 mediation would be productive. When so inquiring, however, the circuit court may not inquire as  
20 to the basis for any party's response and no party may attempt to explain the reason for that response.  
21 Only if one of the parties indicates that it believes further mediation would be productive may the  
22 circuit court order mediation to resume.

1 **§55-10A-5. Costs.**

2 All costs associated with mediation, including the fees of the mediator, shall be borne equally  
3 by the parties to the mediation and shall be paid within thirty days of submission of an invoice for  
4 such costs.

5 **§55-10A-6. Trial of the civil case.**

6 Mediation may not be used as a basis for delaying or avoiding trial. Accordingly,  
7 notwithstanding the fact that mediation is on-going, the parties shall continue to prepare their  
8 respective cases for trial and such preparations shall not be suspended or any trial date extended  
9 based upon on-going mediation unless by express order of the court.

10 **§55-10A-7. Savings to the state.**

11 As part of the State of the Judiciary Report which the Chief Justice of the State Supreme  
12 Court of Appeals makes to the Legislature, the Chief Justice is requested to report on the number of  
13 civil actions referred to mediation as provided herein and percentage of such civil actions resolved  
14 through such mediation in order to allow the Legislature to assess the effectiveness of the mediation  
15 process.

NOTE: The purpose of this bill is to encourage the resolution of civil cases pending in civil courts through mediation, to outline the process for mediation, and to prescribe minimum standards for the conduct of mediations in the state.

This article is new, therefore, strike-throughs and underlines have been omitted.